



**Portugal – what will the future of private copying levies be?, *Grur International*, 2011-11, p. 992.**

On 2 May 2011 the Ministry of Culture in Portugal made public a law proposal concerning the regulation of private copying levies. The law currently in force dates from 2004 and had in turn made some changes to the original law, dated from 1998.

The proposal modifies several features of the current regime. In what concerns reprography, for example, Article 3 of the proposal establishes that authors and editors shall receive an equal share of a total of 0,02 Euro per photocopy (to be included in the price of copies of copyrighted works). Moreover, the same provision recognises that, in the context of reprography, authors of scientific and study books are among the most affected right holders. Consequently, such authors are entitled to a share of 75% of the total net revenue received by authors.

In addition, it is praiseworthy that the proposal follows the general centralisation tendency in the field of collective management: according to Article 11, reprography and private copying are to be managed by one single entity.

One of the most controversial provisions of that law proposal is its Article 5, which reads something like “The equitable compensation of authors and performers is inalienable and cannot be waived. Any contractual clause to the contrary shall be null and void.” The controversy arose mainly due to doubts regarding the compatibility of this provision with Creative Commons licenses. Meantime, Creative Commons Portugal has come to clarify that the proposal is compatible with licenses 3.0.<sup>1</sup> This is because, in that version of Creative Commons licenses, the licensor reserves the right to collect statutory royalties or royalties under compulsory licenses for commercial uses.

Furthermore, while it is true that this wording is dangerously close to the moral rights jargon, things are not as dark as one might perceive. In fact, this “equitable compensation” is solely the one due for private copying. In other words, what English speakers would call “private copying levies”, the Portuguese call “equitable compensation.” Linguistic idiosyncrasies aside, it is safe to assume that Article 5 does not apply to all economic rights.

That however does not mean that the proposal, if it ever becomes a law, will not be without (harmful) consequences. Attention should be driven away from the compatibility of the law proposal with Creative Commons – instead, the whole text should be carefully read. There are several aspects of this proposal which are particularly worrying.

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<sup>1</sup> See

[http://www.inteli.pt/uploads/cms/20110511120456\\_Proposta\\_de\\_Lei\\_da\\_Copia\\_Privada\\_NAO\\_ilegaliza\\_licencas\\_CC.pdf](http://www.inteli.pt/uploads/cms/20110511120456_Proposta_de_Lei_da_Copia_Privada_NAO_ilegaliza_licencas_CC.pdf) (last visited 18 September 2011). For a brief explanation on Creative Commons licenses version 3.0 see [http://wiki.creativecommons.org/Version\\_3](http://wiki.creativecommons.org/Version_3) (last visited 18 September 2011).

One example is the fact that Portuguese copyright law would have one more economic right, subject to mandatory collective management, which cannot be waived. There are countless philosophical implications of this incest between moral and economic rights, which cannot all be analysed or even listed here. For now, suffice it to say that moral and economic rights have different justifications and their legal regimes reflect important, underlying principles. There is a reason why moral rights cannot be waived. It is questionable whether such reasons are present in private copying levies.

Another innovation of this proposal is the inclusion in its scope of digital recording devices, which were traditionally exempted from levies altogether. The drafters decided to include in the list of devices subject to levies: USB sticks (0,06 Euro per GB); external drives (0,02 Euro per GB); hard drives (0,02 Euro per GB, plus 0,005 per GB over 1 TB); devices used to reproduce audio, visual or audiovisual files in compressed form, integrated or not in other devices, like mobile phones (0,50 Euro per GB). Given the capacity of these media nowadays, it is easy to acknowledge the economic potential of this new source of income. There is yet another problem here: this type of equipment is not mainly used for private copying purposes. For example, most users use the hard drive of a computer to work on a daily basis, and not to make private copies of copyrighted works. The justification for including these devices is therefore flawed.

This law proposal was already finalised and ready to be voted in Parliament when the political crisis hit Portugal and the previous government left office. The new government announced, on 28 June 2011, that within a period of six to eight months a new law on private copy will be drafted. At the time of writing there was still no news on the content of such law – just vague promises that the law would address “current needs and demands.” Whether the new law will build upon the previous proposal is therefore still a question mark. Whatever the final version of it might be, though, let us hope that it will tackle its predecessor’s deficiencies.

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